IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 582 OF 1999

Vicky Sudarshan Naskar .. Appellant

versus

The State of Maharashtra .. Respondents

(At the instance of

Malvani P.stn. C.R.No.1/98)

Smt.Rachita Dhuru for the appellant.

Mr.D.P. Adsule, APP for the State.

WITH

CRIMINAL APPEAL NO. 687 OF 2001

Ganesh Kanhayalal Sharma .. Appellant

versus

The State of Maharashtra .. Respondents

(At the instance of

Malvani P.stn.)

Smt.Rachita Dhuru for the appellant.

Mr.D.P. Adsule, APP for the State.

CORAM : V.M. KANADE, J

DATED : 6th September 2004.

ORAL JUDGEMENT:-

1. Both the appellants have challenged a judgement and order passed by the Special Judge, NDPS for Brihan Mumbai in NDPS Special Case no.102 of 1998 by order dated 1st April 1999 and 5th April 1999.

2. The prosecution case as disclosed by the complainant PW No.1 Shri Azam Khan is that he was called to Malwani Police station on 27th January 1998 to act as a panch. At that time, he was introduced to PI Ghoble who informed him and his co-panch that he had received information that two persons were likely to come at Charkop for dealing in charas. He has stated that PI Ghoble asked the constables to take search but nothing incriminating was found on his person. Thereafter, PI Ghoble asked him and his co-panch to take search of the police members and the leading party. Accordingly, they took the search of the leading party but no incriminating substance was found. Thereafter, he was told to go to Charkop to

get the weighing scales, stationery, packing material, drug identification kit. This was also searched by them but nothing incriminating was found. A trap panchnama was prepared after the entire procedure was completed, they went towards building which was under construction and kept a watch near Chamunda stores. They caught two persons who tallied the description given by informant in the information. The police surrounded those two persons and their search was taken. PI Ghoble told those two persons that their search could be taken before a superior Officer or a Magistrate. The two persons gave their consent for being searched by PI GHoble, since he was a superior Officer. PW No.1 identified the two persons as the same persons were sitting in the Court as accused nos.1 and 2. Two packets were recovered from accused no.1 from his right hand side pocket. PW No.1 has given the description of these packets. A substance which was found in the packet was tested and it was identified as charas. The packets was sealed and it was kept in a khakhi colour envelope. Thereafter, the accused no.2 was searched and two packets were found in his left hand side pant pocket. The substance in the pocket was identified after chemical examination to

be charas. This packet was also sealed. PW no.1 has narrated the procedure of sending the said packet for sealing the packet. These packets were identified by the witness in the Court and they were opened in the Court. This witness was cross-examined at length particularly regarding the quantity which was recovered and also regarding the weighing scale. The witness could not state what was the maximum capacity of the weighing scale or from where it was procured. The second witness which has been examined by the prosecution PW no.2 is Shivaji Jagannath Adav, PSI was attached to Malvani Police station. He has also narrated the incident which transpired on 27th January 1998. He has stated that information was received from one of his informers to give information regarding a drug transaction which was to take place at 3.00 p.m. PW no.2 has stated that he asked constable Kakole to bring the narcotics kit. It is further stated that the informant came at about 3.00 p.m. and gave information about the accused by informing him the names of the accused as also their general description regarding their height, complexion and the place where the transaction was to take place. Detailed information was taken down in the information book which was maintained by PW no.2.

He thereafter, informed PI Ghoble who instructed him to arrange for the raid. Thereafter, PW no.2 has given details regarding the two panchas and the procedure which was carried out by PW No.2 and other panchas. He has corroborated the evidence of PW no.1. The prosecution also examined PW no.3 who is the carrier who carried out the seized material to the Chemical Analyser and PW no.3 is the Investigating Officer, Trimbak Ghoble who was attached to the Malvani Police station at the material time. The trial Court has after perusal and appreciation of the evidence has come to the conclusion that the charge of conspiracy is not proved. However, the trial Court after appreciating the evidence on record has held that the prosecution has proved that the accused no.1 was found in possession of 491 grams of charas and accused no.2 was found in possession of 490 grams of charas. ON the basis of this evidence, the trial Court convicted both the accused to undergo a Rigorous Imprisonment for 10 years with a further direction to pay a find of Rs.1,00,000/- each and in default of payment of find to further undergo Simple Imprisonment for four months.

3. I have heard the learned counsel appearing on behalf of the appellant and the learned APP for the State. The learned counsel appearing on behalf of the appellant has strenuously urged that there was a serious discrepancy regarding the manner in which the information was recorded in the information book. It was submitted that the provisions of section 50 of the NDPS Act was not complied by the prosecution. It was submitted that before the search was taken, the rights of the accused must be explained to the accused implied in judgement reported in 1996 Cr.L.J. page 454. It was submitted that it was held in the said judgement that if the right is not explained in the language known to the accused in that event, it will have to beheld that procedure as contemplated under section 50 of the NDPS Act has not been complied. He further submitted that the record did not indicate that the Officer had infact signed on the labels of the packets which were allegedly recovered from the accused. Similarly, copy of the panchnama also was not given to the accused. He further submitted that the provisions under section 42 and 50 are not complied and there was serious omissions and discrepancies in the prosecution evidence which created a serious doubt regarding the

veracity of the prosecution case. He submitted that from the cross examination of PW No.1 it was very clear that PW no.1 was not in a position to satisfactorily explain as to how the weighing scales were procured. He further submitted that though a technical scale was used for weighing the incriminating substance recovered from the accused, there was no mention about the use of electronic scale in the First Information Report. He further submitted that another vital discrepancy and flaw in the prosecution case was that the panchnama at Exhibit 6A does not mention that PHI Ghoble put the search on the accused. The learned counsel appearing on behalf of the appellants has taken me through the oral and documentary evidence on record. He has submitted that the judgement and order passed by the trial Court ben set aside and the accused be acquitted. He submitted that the accused no.1 was only 20 years of age when he was arrested and accused no.2 was only 24 years of age. He submitted that they are in jail since 27th January 1998. He submitted that in the event this Court came to the conclusion that the finding given by the trial Court is correct. He submitted that in any event, sentence may be reduced from 10 years to 5 years. He relied

on various judgements of this Court wherein the Court has reduced the sentence in similar cases. The learned APP appearing on behalf of the State vehemently opposed the submissions made by the learned counsel. He submitted that the prosecution had examined four witnesses. The evidence of PW no.1 pancha was corroborated by PW no.2. He has submitted that inspite of searching cross examination on the part of the learned counsel appearing on behalf of the accused, the witnesses had maintained their stand and there was no serious omissions or contradictions in their case. He submitted that though the theory of conspiracy could not be proved in the trial Court, the other charges had been confirmed. He submitted that so far as the possession of narcotic drug is concerned, the prosecution had proved the said charge against both the accused. He submitted that the trial Court had given cogent reasons while accepting the prosecution case and there was no reason to set aside the said finding given by the trial Court.

4. In the present case, the accused were charged under section 8C, section 20(ii)(b) and 29 of the NDPS Act. So far as the charge of conspiracy is concerned, the trial court has held that this charge

is not proved against the accused. It is an admitted position that the prosecution case is that the accused was found to be in possession of 491 gms of charas. In contradiction of provisions under section 8C of the NDPS Act and so far as accused no.2 is concerned, the prosecution case that he was found in possession of 490 grams of charas. Section 8 lays down manufacture, sale of possession of charas is an offence punishable under the Act and section 20 lays down the extent of punishment. Section 20 reads as under :

> **20. Punishment for contravention in relation to cannabis plant and cannabis.** - Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder:-
>
> (a) cultivates any cannabis plant; or
>
> (b) produces,manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis.
>
> shall be punishable -
>
> (i) where such contravention relates to clause (a) with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to find which may extend to one lakh rupees; and
>
> (ii) where such contravention relates to sub-clause (b) -

> (A) and involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;
>
> (B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees:
>
> (C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:
>
> Provides that the court may, for reasons to be recorded in the judgement impose a fine exceeding two lakh rupees:

5. From the perusal of section 20 and more particularly clause (ii) which was amended by Act IX of 2001 which has come into effect from 2nd October 2001, it is clear that the possession of narcotic drug is classified into three categories which are mentioned in clauses A, B and C. Clause-A pertained to possession which involved small quantity. Clause-B involved quantity less than commercial quantity but greater than small quantity and Clause-C pertains to possession of the drug which is being

used for commercial purposes. Small quantity and commercial quantity have been classified as per the notification which has been issued in exercise of the powers conferred by clause (viia) and (xiiia) of section 2 of the NDPS Act 1985. As per the said clause, Sr.no.23 pertains to charas and small quantity is shown as 100 grams and commercial quantity is 1 kg. Section 41 of the amendment Act of 2001 specifically makes the amendment act applicable to pending cases. Section 41 reads as under:-

> **"41. Application of this Act to pending cases.**
>
> (1) Notwithstanding anything contained in sub-section (2) of section 1, all cases pending before the Courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commencement of such offence:
>
> Provided that nothing in this section shall apply to cases pending in appeal.
>
> (2) For the removal of doubts, it is hereby declared that no Act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this Act has not come into force.

6. In view of the specific provisions under the amendment Act, though the trial Court has given a judgement on 5th April 1999 and an appeal was filed thereafter. The amended provision of the act are made applicable to this pending criminal appeal.

7. After having perused the judgement and order and the evidence on record, in my view, the prosecution has clearly established their case against the present accused. It is difficult to accept the submissions made by the learned counsel appearing on behalf of the appellant that the procedure under section 42 read with section 50 has not been followed. On the perusal of the evidence of the evidence of PW no.1, PW no.2 and PW no.3 it is abundantly clear that the said procedure has been followed to the hilt. It is no doubt proved that there are certain omissions and contradictions in the statement of PW Nos.1 and 2. However, it cannot be said merely because these contradictions are found in the evidence of PW nos.1 and 2. Their evidence should be discarded. The discrepancy regarding the procurement of weighing scales and absence of reference to an electronic scale in the First Information Report, in my view, cannot be

said to be fatal to the prosecution case. The submissions made by the learned counsel appearing on behalf of the State will therefore, have to be accepted.

8. The conviction therefore is confirmed. So far as the question of sentence is concerned, the case squarely falls under section 20(ii)(b). In the present case, the trial court has held that the prosecution has failed to establish that there was a conspiracy between the accused nos.1 and 2. According to the prosecution, the quantity found in possession of accused no.1 was 491 grams. So far as accused no.2 is concerned, it was 490 grams. The small quantity so far as Charas is concerned is 100 grams and commercial quantity is 1000 grams. The quantity therefore, is more than the small quantity. However, definitely less than commercial quantity. The sentence prescribed by section for such an offence is Rigorous Imprisonment for a term which may extend to 10 years with fine. The trial Court has imposed a sentence of 10 years which is maximum sentence prescribed under the said section.

9. It is an admitted position that the accused at the time of the commission of the offence was 20 years and accused no.2 was 24 years of age. There are no prior antecedents. The accused are already in jail since 27th January 1998 and almost a period of 6 years and 8 months are over. Under the provisions of the NDPS Act, an accused is not entitled for an remission of sentence. They are therefore, in jail continuously for the entire period of 6 years and 8 months. In my view, this is a fit case where the sentence should be reduced from 10 years to 7 years. However, so far as the fine is concerned, the amount of find is not reduced but in the event of default of payment of fine, accused shall suffer Simple Imprisonment for a period of 3 months instead of 4 months.

10. Both the appeals are partly allowed in the above terms.

V.M. KANADE, J